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No. 05-1454

Supreme Court, U.S.
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In The
Supreme Court of the United States

JAMES M. ERIKSON, *et al.*,

Petitioners,

v.

FARMERS GROUP, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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June 14, 2006

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CORPORATE DISCLOSURE STATEMENT OF FARMERS GROUP, INC.

Pursuant to SUP. CT. R. 29.6, Farmers Group, Inc. states that its parent company is Zurich Financial Services, whose stock is traded on the London and Zurich Stock Exchanges.

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PRELIMINARY STATEMENT

Petitioners' Petition for a Writ of Certiorari argues their continuing disagreement with the application of settled rules of law by the United States District Court for the Western District of Oklahoma (the "District Court") and the affirmance of that application of settled rules of law by the United States Circuit Court of Appeals for the Tenth Circuit (the "Circuit Court").

Below, Petitioners asserted claims against Respondents for what Petitioners called: (1) misrepresentation; (2) invasion by intrusion; (3) private life invasion of privacy; (4) false light invasion of privacy; and (5) RICO. The alleged conduct giving rise to these five claims was the mailing of a single letter to 46 of Petitioners' health-care providers seeking production of medical records during discovery in an earlier car wreck case brought by Petitioners against an insured of Respondent Farmers to whom Farmers provided a defense. Although the letter enclosed a Court Order waiving medical privilege for conditions relevant to the car wreck suit, the premise of Petitioners' asserted claims was that the language of the letter requested a broader scope of records than authorized by the language of the Order itself.

The District Court granted Respondents' motion to dismiss under Fed. R. Civ. P. 12(b)6. The Circuit Court – in an unpublished opinion – affirmed and rehearing *en banc* was denied. The affirmance was based on the application of established and quite uncontroversial rules of law to the particular circumstance of this case; namely, that the Petitioners' state law claims were subject to a two-year statute of limitations and that the RICO claim required an allegation of a pattern of racketeering activity.

The "Questions Presented" by Petitioners make plain that this is a party-specific case of no significance to anybody but the parties to it. First, there is no question that both the District Court and the Circuit Court correctly stated the law requiring the court to take all well-pleaded factual allegations as true and construe them in the light most favorable to the non-moving party and stated that they did so. (Circuit Court Order and Judgment, Appendix C, p. 7a; District Court Order, Appendix D, p. 15a.)[1] Petitioners' argument is simply that the District Court (when dismissing) and Circuit Court (when affirming) misapplied that correctly stated rule of law. Second, there is no question that both courts applied the correct two-year statute of limitations to the Oklahoma tort claims, although Petitioners argue the commencement date under the particular facts. Third, there is no question that both courts properly ruled that RICO requires a pattern of racketeering activity. Petitioners, in an untimely argument, simply contend that their pleadings should be construed as alleging one. This is not a case worthy of certiorari review.

Plaintiffs lost at the District Court. They had their appeal to the Circuit Court. They lost at the Circuit Court, and applied to the Circuit Court for rehearing *en banc*. Their Petition for Rehearing was denied. The Petition for Writ of Certiorari presents no persuasive reason for this Court to grant review.

[1] References herein to the "Appendix" are to the Appendix to Petitioners' Petition for Writ of Certiorari.

OPINIONS BELOW

Respondents' 12(b)(6) motion to dismiss the state law tort claims argued that those claims were barred by the statute of limitations. The supposedly wrongful conduct took place almost four years before this lawsuit was filed and the supposed injury occurred more than two years before this lawsuit. There is no dispute that Oklahoma applies a two-year limitation period to such claims.

The District Court granted Respondents' Motion to Dismiss, concluding:

> The allegations of the Second Amended Complaint thus demonstrate that "at trial," *i.e.*, no later than June 28, 2000, plaintiffs knew or had reason to know of the injury which is the basis for their claims of misrepresentation, invasion of privacy by intrusion, private life invasion of privacy, and false light invasion of privacy. In accepting the facts alleged in the Second Amended Complaint as true, it is clear that plaintiffs knew or should have known, no later than June 28, 2000, that defendant had obtained medical records from their health-care providers which exceeded the scope of the court's Order for Waiver of Medical Privilege. Plaintiffs knew at the time of trial that they had not provided the records to defendant. Plaintiffs' alleged injury occurred "at trial". Therefore, plaintiffs' original complaint in this lawsuit, filed August 14, 2002, more than two years after the June 26 through June 28, 2000 state court trial, was untimely and plaintiffs' tort claims are barred by the applicable statute of limitations. 12 O.S. § 95 (two year statute of limitations applies to action for injury to the rights of another, not arising on contract).

> In light of this determination, the court need not and does not consider the merits, if any, of plaintiffs' tort claims. Nor is the court required to address the other arguments submitted by defendant in support of dismissal of the tort claims. However, were the court to consider the other arguments, the court determines that dismissal of the tort claims would be warranted on the other grounds raised by defendant in the Motion to Dismiss.

(District Court Order, Appendix D, p. 22a.)

The District Court also dismissed Petitioners' RICO claim as follows:

> The allegations of the Second Amended Complaint, even if true, are insufficient as a matter of law to support a RICO claim and fail to satisfy the required RICO pattern of racketeering activity.

(District Court Order, Appendix D, p. 24a.)

Petitioners appealed the judgment of the District Court to the Circuit Court. In their briefing to the Circuit Court, however, Petitioners argued only that: (1) the dismissal of their tort claims based on the statute of limitations was erroneous because they learned the precise nature of the wrongful conduct within the two-year period; (2) dismissal of the RICO claim was erroneous because the sending of the one letter to multiple recipients in the car wreck lawsuit was a sufficient showing of a pattern; (3) they should have been given leave to amend their already twice amended Complaint despite their failure to ask for leave to do so; and (4) granting Respondents' motion to dismiss prior to Petitioners conducting

any discovery was premature, despite the fact that Petitioners did not attempt to initiate any discovery.

The Circuit Court affirmed the District Court's dismissal of the state law tort claims as follows:

> Applying Oklahoma's two-year statute of limitations for invasion of privacy and misrepresentation, the statute of limitations expired no later than June 28, 2002. Plaintiffs did not file this lawsuit until August 14, 2002. Therefore, the district court properly held that Plaintiffs' misrepresentation and invasion of privacy claims are barred by the statute of limitations. Because Plaintiffs' state law claims are barred by the statute of limitations, we do not consider Farmers' other defenses.

(Circuit Court Order and Judgment, Appendix C, pp. 10a-11a.)

The Circuit Court affirmed the dismissal of RICO claims as follows:

> Plaintiffs have not alleged the type of long-term criminal activity against which the RICO statute is aimed. *See H.J. Inc.*, 492 U.S. at 242. Accordingly, the district court's dismissal of the RICO claim was not in error.

(Circuit Court Order and Judgment, Appendix C, pp. 12a-13a.)

Petitioners moved the Circuit Court for rehearing *en banc*, which was denied. (Circuit Court Order, Appendix B, p. 3a.)

The Order of the District Court and the Order and Judgment of the Circuit Court were unpublished.

SUMMARY OF REASONS TO DENY CERTIORARI

The first reason the Petition for Writ of Certiorari should be denied is that the District Court (when considering Respondents' Motion to Dismiss) and the Circuit Court (when reviewing the District Court's dismissal) properly stated the law. Both courts recognized their obligation to take all well-pleaded factual allegations as true and view them in the light most favorable to Petitioners. The District Court and Circuit Court both stated that they did in fact take all well-pleaded factual allegations as true and view them in the light most favorable to Petitioners. Both applied the correct Oklahoma statute of limitations in dismissing the state law claims. Both applied settled principles of federal law in dismissing the RICO claim. Thus, the "Questions Presented" by Petitioners are, at most, claimed misapplications of properly stated rules of law. Even if Petitioners were correct, the Petition would not be worthy of certiorari review. *See Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) ("The jurisdiction of the Supreme Court to review cases by way of certiorari was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing").

The second reason the Petition for Certiorari should be denied is that the Petition does not invoke any legitimate reason for certiorari review as set forth in Supreme Court Rule 10. Instead, the basis of the Petition is simply that Petitioners disagree with the conclusions of the District Court and the unanimous unpublished decision of the Circuit Court which considered Petitioners' appeal. As will be shown below, however, the District Court was correct – on the merits – in its dismissal of Petitioners' Second Amended Complaint. The Circuit Court panel which considered Petitioners' appeal was correct – on the

merits – when it affirmed that dismissal. The Circuit Court *en banc* was correct to deny rehearing.

STATEMENT OF THE CASE[2]

In 1997, Petitioners filed a lawsuit against an insured of Farmers for alleged soft-tissue injuries and broken eyeglasses sustained in a car accident. The style of the car accident case was *Erikson and Kilgallen v. Davis*, Case No. CJ-97-2054-BH, District Court of Cleveland County, Oklahoma (hereinafter "*Davis*"). (District Court Order, Appendix D, p. 16a; Docket, Appendix E, p. 26a.) During discovery in *Davis*, the District Court of Cleveland County Oklahoma issued an Order For Waiver Of Medical Privilege, "Order[ing] waiver of Plaintiff[s'] . . . medical privilege with the following restriction: waiver of medical privilege only applies to headache, neck, back, shoulder, arm and blood pressure problems." (District Court Order, Appendix D, pp. 16a-17a, ¶¶ 10, 11.) Thereafter, a legal assistant at Dobbs & Middleton (the law firm representing the defendant in Petitioners' car wreck case and alleged to be employees of Farmers) sent a letter to 46 medical service providers who had treated or examined Petitioners before or after the automobile accident. (*Id.*, pp. 18a-19a,

[2] What controlled the District Court's decision below was what was alleged in the Second Amended Complaint, undisputed documents which aided the District Court by supplementing a factually inadequate complaint and matters of public record. (District Court Order, Appendix D, p. 16a.) Much of what Petitioners contend in their Statement of the Case cannot be found in the record below. Their attempt to cure the insufficiency of their Second Amended Complaint by unsupported allegations in a Petition for a Writ of Certiorari to the United States Supreme Court confirms the Second Amended Complaint's inadequacy.

¶¶ 14-16; Second Amended Complaint, Appendix F, pp. 61a-62a, ¶ 16.) The letter provided:

> Enclosed please find a [sic] Order for Waiver of Medical Privilege of Plaintiff James Erikson allowing the release of medical information. Please forward to our office the **complete medical records** (every page) including office notes, handwritten notes, **initial intake questionnaire**, laboratory test results, medical reports, and correspondence received from or rendered to other persons, progress or office notes, x-ray reports, consulting reports, medical liens, all medical bills ***or other information contained in the patient's chart or file***. Please understand that this request is for copies of existing records only, and no request is being made at this time for a new narrative report.

(Emphasis in original.) (District Court Order, Appendix D, p. 19a, ¶ 14.)

According to Petitioners, even though the letter enclosed the Order of Waiver, it misdescribed the scope of records to be produced and resulted in the production and subsequent use at trial in *Davis* of information which Petitioners contend was beyond the scope of the Cleveland County District Court's Order. The sending of that one letter to multiple recipients was the sole occurrence of allegedly tortious conduct supporting Petitioners' state law claims and the sole alleged predicate act supporting their RICO claim.

The record demonstrated that Petitioners were aware that the defendant in *Davis* had obtained their medical records before January 20, 2000, more than 2½ years prior to the filing of the lawsuit. The use of those records at trial

occurred June 26 and 27, 2000, two years and six weeks before suit was filed. Applying settled Oklahoma precedent, the Court held that the case was barred by limitations.

The Order and Judgment of the Circuit Court summarizes the salient events as follows:

> On January 20, 2000, Plaintiffs filed a motion *in limine* in the state court proceedings to exclude any reference to their pre-existing medical conditions or disabilities. In the motion, Plaintiffs argued that Farmers provided the Plaintiffs with an extensive and voluminous collection of Plaintiffs' pre-existing medical conditions, constituting approximately 2,000 pages of records. Plaintiffs sought to exclude the medical records because Farmers obtained the records without providing Plaintiffs with a copy of the subpoena as required under Oklahoma law. Although the record is not entirely clear, this motion was apparently denied.
>
> Plaintiffs allege that at trial, on June 26, and 27, 2000, Farmers introduced confidential medical records that were outside the scope of the partial medical privilege waiver. Specifically, they allege that at trial Farmers made known to the court, jurors, and general public confidential medical information relating to injuries suffered in a taxicab accident in the 1940s, that one of them was prescribed Prozac, and that one of them had been previously prescribed massage therapy. Plaintiffs claim that these medical records were not relevant to the personal injury claim, and that they were unduly embarrassed, surprised and taken aback when this evidence was introduced at trial. The jury returned a verdict in favor of Ms. Davis-Lauderdale on June 28, 2000.

> Later, on August 14, 2000, Plaintiffs received a copy of the letter sent by Farmers to Dr. Thomas Hoffmeyer, one of Mr. Erikson's medical providers. Plaintiffs then subpoenaed Farmers for copies of all letters sent to Mr. Erikson's and Mr. Kilgallen's medical providers, and Farmers produced copies of all letters. On September 26, 2000, Plaintiffs moved in the District Court of Cleveland County for a judgment notwithstanding the verdict, based in part on their assertion that Farmers wrongfully obtained the medical records that were used against Mr. Erikson and Mr. Kilgallen at trial. After the trial court denied the motion, Plaintiffs appealed to the Oklahoma Court of Civil Appeals, which affirmed.

(Circuit Court Order and Judgment, Appendix C, pp. 6a-7a.)

Petitioners filed this lawsuit on August 14, 2002 (Circuit Court Order and Judgment, Appendix C, p. 5a). Two amendments later, Respondents were first served with Petitioners' Second Amended Complaint, asserting that liability can be based on an allegation that the letter seeking discovery in *Davis* overstated the scope of the Cleveland County District Court's order.

ARGUMENT

I. The United States District Court For The Western District Of Oklahoma And The United States Court Of Appeals For The Tenth Circuit Both Properly Stated The Applicable Rule of Law

In considering Respondents' arguments based on Oklahoma's statute of limitations, and in considering the fundamental flaw in Petitioners' RICO claim, the District

Court and the Circuit Court both correctly stated the applicable substantive and procedural legal principles. Both recognized their obligation to take all well-pleaded factual allegations as true and view them in the light most favorable to Petitioners. The "Questions Presented" by Petitioners are – at most – issues of whether the District Court and Circuit Court misapplied a properly stated rule of law. Petitioners point to nothing in their Petition for Writ of Certiorari to make this case one of the rare exceptions to Supreme Court Rule 10 worthy of certiorari review. For this reason alone, the Petition for Writ of Certiorari should be denied.

II. On The Merits, The District Court And Circuit Court Of Appeals Properly Applied The Applicable Rule Of Law

A. Petitioners' Tort Claims Were Properly Dismissed[3]

Title 12 O.S. § 95 – Limitation of Actions – provides for a two-year statute of limitations for "an action for injury to the rights of another, not arising on contract." The trial in *Davis* was the event at which Petitioners claim that "Defendant made known to the court, the jurors and general public in attendance confidential medical information."

[3] Although the District Court relied primarily on Oklahoma's two-year statute of limitations to dismiss Petitioners' state law tort claims, it additionally concluded that were it to address the other arguments submitted by Respondents, dismissal would be warranted on those grounds as well (District Court Order, Appendix D, p. 22a.). Because the Circuit Court concluded that the District Court was correct in its application of the bar of the statute of limitations, it did not address the other grounds asserted by Respondents. (Circuit Court Order and Judgment, Appendix C, p. 11a.)

(Second Amended Complaint, Appendix F, pp. 59a-60a, ¶ 12.) The jury trial in *Davis* concluded on June 27, 2000, and the jury returned its verdict on June 28, 2000. Petitioners' original complaint in this lawsuit was filed August 14, 2002. The two-year statute of limitations provided by 12 O.S. § 95 bars Petitioners' claims. Petitioners' only argument that their tort claims are not barred is their allegation that they did not know how counsel for Ms. Davis acquired the allegedly privileged evidence. This argument fails for three reasons. First, as the Circuit Court correctly held under Oklahoma law, a plaintiff need not conclusively know of the claimed cause of an injury before a statute of limitations is triggered, only that he has allegedly been injured. *Chasteen v. UNISIA JECS Corp.*, 216 F.3d 1212, 1218 (10th Cir. 2000); *Baker v. Board of Regents*, 991 F.2d 628, 632 (10th Cir. 1993); *see, also Samuel Roberts Noble Foundation, Inc. v. Vick*, 1992 OK 140, ¶ 31, 840 P.2d 619, 626 (statute of limitations bars claim):

> [T]he Foundation urges that because the exact source of the problem was unknown until the independent report was completed, the limitations period did not begin until then. We disagree. It is uncontroverted that the defects in the building began to appear almost immediately. Even though there was some uncertainty as to the reasons for the problem, the observation of doors sticking and tiles popping off alerted the Foundation that a problem existed.

Daugherty v. Farmers Coop. Ass'n, 1984 OK 72, ¶ 12, 689 P.2d 947, 950-51:

> Properly limited, a discovery rule should encompass the precept that acquisition of sufficient information which, if pursued, would lead to the

> true condition of things will be held as sufficient knowledge to start the running of the statute of limitations.

Here, Petitioners knew no later than January 20, 2000, that counsel for Ms. Davis had acquired documents from sources other than Petitioners. The injury of which Petitioners complain occurred no later than at the trial on June 26 and 27, 2000, when the allegedly privileged material was introduced as evidence. Plainly, the jury's verdict in *Davis* on June 28, 2000, was the latest event triggering the statute of limitations. Both the District Court and Circuit Court were correct concluding that Petitioners' lawsuit – filed August 14, 2002 – is too late.

Next, Petitioners' argument to avoid the bar of the statute of limitations was belied by the record below. When they filed their motion *in limine* in *Davis* on January 20, 2000, Petitioners represented to the District Court of Cleveland County that on December 3, 1999, they knew that counsel for Farmers had – during the course of discovery in *Davis* – obtained information from sources other than Petitioners, including what Petitioners called "an extensive and voluminous collection of Plaintiffs' pre-existing medical conditions consisting of approximately two thousand (2000) pages of records." (Circuit Court Order and Judgment, Appendix C, p. 6a.) Petitioner Erickson – a lawyer himself – knew that Ms. Davis' counsel had what Petitioners claim they should not have had produced to them by at least that date, six months before trial in the *Davis* lawsuit, and well over two years before the Complaint below was filed. For this reason as well, Petitioners' attempt to avoid the bar of the statute of limitations fails.

And finally, there is no allegation in the Second Amended Complaint that Respondents concealed the legal assistant's mailing of the letter which resulted in the production of the allegedly confidential information. While any such allegation would have been legally inconsequential and factually inaccurate in light of Petitioners' state court arguments to the contrary, the truth is that no such argument was ever presented to the District Court.

What Petitioners did plead was that the event at which they were "unduly embarrassed, surprised and taken aback . . . and thereby defamed" was the trial of *Davis*, which concluded on June 27, 2000, more than two years before this lawsuit was filed. That they claim now that they did not know the cause of their injury (despite the ample evidence in the state court proceedings to the contrary) does not allow them to avoid the bar of 12 O.S. § 95.

The District Court correctly concluded that Petitioners' tort claims were time-barred and the Circuit Court correctly affirmed the District Court.

B. Petitioners' RICO Claim Was properly Dismissed By The District Court. The Circuit Court's Affirmance Was Correct

Petitioners' Second Amended Complaint contained a RICO claim which was also dismissed by the District Court. That dismissal was affirmed by the Circuit Court.

A complaint asserting a RICO claim must allege: (1) conduct; (2) of an enterprise; (3) through a pattern; and (4) of a racketeering activity. After taking all well-pleaded allegations in the Second Amended Complaint as true and

construing them in the light most favorable to Petitioners, the Circuit Court addressed the flaw in Petitioners' RICO claim as follows:

> Nor have Plaintiffs alleged that Farmers consistently engages in this pattern of misrepresentation and mail fraud in its regular course of business, such that future claimants in Plaintiffs' situation will suffer the same injury.

(Circuit Court Order and Judgment, Appendix C, p. 12a.)

The Circuit Court further stated:

> Plaintiffs' allegation amounts to no more than a claim that Farmers engaged in a single scheme to obtain medical information about them before the Oklahoma trial from a large number of sources. Plaintiffs cannot demonstrate closed-ended continuity because the predicate acts of mailing the letters occurred exclusively during discovery – a period not exceeding a few months.

(Circuit Court Order and Judgment, Appendix C, p. 12a.)

In their Petition for Writ of Certiorari, however, Petitioners claim that the Circuit Court was wrong because Paragraph 1 of the Second Amended Complaint is an allegation "that anyone who makes a claim against Farmers was included." A fair reading of Paragraph 1 of the Second Amended Complaint does not support the leap that Petitioners argue. The word "claimants" in context is more easily read as a shorthand reference to Mr. Kilgallen and Mr. Erikson than as an allegation that other individuals were subjected to similar treatment. Even if Plaintiffs had intended Paragraph 1 to allege fraud against an unspecified group of victims, a bare legal conclusion unsupported by any factual allegation is hardly a well-pleaded

allegation of mail fraud as a predicate to RICO liability, particularly in light of the requirement to plead with particularity. *See Robbins v. Wilkie*, 300 F.3d 1208, 1211 (10th Cir. 2002) (RICO acts must be plead in conformity with the particularity requirement of Rule 9(b)). Petitioners themselves apparently did not even read Paragraph 1 to allege what they now contend it means until after the Circuit Court's opinion was issued. Their current argument was never communicated to the District Court. It was not an argument that was made to the Circuit Court in Petitioners' Opening Brief or in their Reply Brief. Nowhere in either of those briefs is Paragraph 1 of the Second Amended Complaint even mentioned. It was only in their Petition for Rehearing to the Circuit Court that Petitioners argued that Paragraph 1 of the Second Amended Complaint should have been considered to allege an ongoing pattern. This was too late, and the Petition for Rehearing was properly denied. *See* Fed. R. App. P. 40(a)(2); *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

Moreover, even if there were a well-pleaded allegation of a pattern of racketeering activity in the Second Amended Complaint, conducting discovery and successfully trying a lawsuit under the supervision of the District Court of Cleveland County of Oklahoma (which was reviewed on appeal by the Oklahoma Court of Civil Appeals) is not a suitable RICO predicate act, anyway. *Duran v. Carris*, 238 F.3d 1268, 1270 (10th Cir. 2001); *BancOklahoma Mortg. Corp. v. Capital Title Co.*, 194 F.3d 1089, 1100-1101 (10th Cir. 1999). The issue giving rise to the alleged RICO claim was raised to and disposed of by the District Court of Cleveland County and the Oklahoma Court of Civil Appeals. Dismissal of the RICO claim was

correct. Affirmance of that dismissal was correct. The Petition for Writ of Certiorari should be denied.

III. There Is Nothing About This Case Making It Worthy Of Certiorari Review

The "Questions Presented" in the Petition for Writ of Certiorari make plain that this is not a case worthy of certiorari review. This dispute involves only the parties to this litigation. Petitioners lost at the District Court and lost their appeal by right to the Circuit Court. The decisions were based on application of accepted legal principles, which Petitioners have not challenged. Each respective court's decision is unpublished. There is no reason for the United States Supreme Court to grant discretionary review of the Circuit Court's affirmance.

CONCLUSION

For any of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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